Supreme Court
MAY 3
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

_____ TERM, 1976

NO. 75-1604

SILVER BELL INDUSTRIES, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA, SCANDIAN COMPANY, INC., and RICHARD DONNELLY,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Respectfully submitted,

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE

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OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the District of Colorado is unreported. A copy thereof is in the Appendix hereto. This

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[1] Silver Bell Industries, Inc. is hereinafter referred to as Silver Bell. United States of America is hereinafter referred to as Internal Revenue Service or IRS. Scandian Company, Inc. is hereinafter referred to as Scandian and Richard Donnelly as Donnelly.

Memorandum Opinion and Order was appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals filed its opinion, which is as yet unreported, on February 19, 1976. A copy of the opinion of the Court of Appeals (10th Circuit) is in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

In addition, jurisdiction is conferred upon this Court because of the question of the constitutionality of the taxing statutes involved. In accordance with U.S.C., Sec. 2101(c), this petition for writ of certiorari shall be taken prior to May 19, 1976.

QUESTIONS PRESENTED

1. Whether Sections 6335 and 6338 of the Internal Revenue Code (under which IRS seized and sold Silver Bell's real estate) are so indefinite and vague as to violate Silver Bell's guaranty of due process under the Fifth Amendment.

2. Whether Section 6337 of the Internal Revenue Code (under which Silver Bell attempted to redeem its real estate) is so indefinite and vague as to violate Silver Bell's guaranty of due process under the Fifth Amendment.

3. Whether Section 7502 of the Internal Revenue Code (under which Silver Bell attempted to comply with the redemption statute Section 6337) is so indefinite and vague as to violate Silver Bell's guaranty of due process under the Fifth Amendment.

4. Whether Internal Revenue Service violated Silver Bell's guaranty of due process under the Fifth Amendment in its methods and procedures of levying, seizing, and selling, Silver Bell's real property and in dealing with Silver Bell's redemption rights under Section 6337.

5. Whether Internal Revenue Service violated the applicable statutes and limitations in its levy, seizure and sale of Silver Bell's real property and in dealing with Silver Bell's redemption rights under Section 6337.

STATUTES INVOLVED

United States Constitution
Article XIV - Due Process

Internal Revenue Code
Sections 6335, 6337 and 6338.
Section 7502.

STATEMENT OF THE CASE

Silver Bell was delinquent for unpaid federal employment taxes for the calendar quarters ending June 1970, September 1970, March 1971 and June 1971. Prior to the filing of the federal tax lien (upon which the subject levy, seizure and sale was predicated), Silver Bell paid the taxes for the quarter ending June 1971. The lien filed by IRS erroneously and illegally included the taxes for the quarter ending June 1971, which taxes had previously been paid. Nevertheless the trial court and the Court of Appeals held that the lien (upon which the levy, seizure and sales were predicated) was lawful because some taxes included in the lien were still due and owing at the time of the lien filing and some were still due and owing at the time of the seizure and sale.

IRS, through Revenue Agent Mitchell, seized and sold certain real property (i.e. mining claims) of Silver Bell (i.e. the specific properties that are the subject of this case) to Scandian and Donnelly for the amounts of $1,500.00 and $5,300.80, respectively. Scandian and Donnelly are asking approximately $300,000.00 for the return of these properties to Silver Bell.

Silver Bell maintains that IRS, through its agent Mitchell, did not comply with the applicable tax statutes and regulations, in that Mitchell did not have the authority: (1) to hold

the sale in Denver, Colorado, rather than in San Miguel County; (2) to select the method of sale of the property, to wit, "sealed bids"; and (3) to issue Certificates of Sale provided under Section 6338.

Sales are to be voided, where IRS does not follow the requirements of Section 6335. *Johnson v. Gartlan,* 334 F. Supp. 438, 440-41 (E.D. Va) rev'd on other grounds, 470 F.2d 1104 (4th Cir.); *Bartell v. Riddell* (D.C. Calif. 1962) 9 AFTR 2d 680, 202 F. Supp. 70; *Reece v. Coppinger* (D.C. Ga. 1973) 32 AFTR 2d 73-5553, ____ F. Supp. ____ ; *Margiotta v. District Director* (2 Cir. 1954) 214 F.2d 518, 45 AFTR 1762.

Silver Bell asserts that IRS did not follow the applicable statutes in at least three particular requirements, each of which is discussed, as follows.

1. *Michael Mitchell, a Revenue Officer, did not have the authority to hold the sale in Denver, Colorado.*

The mining claims involved are located in San Miquel County, Colorado, in the so-called "Western Slope" area of Colorado. Mitchell held the purported sale in the City and County of Denver, Colorado.

Section 6335(d) of the Internal Revenue Code provides:

> "(d) Time and Place of Sale. *** The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate."

The reference in the statute is to the Secretary of the Treasury. All delegations of authority by the Secretary to any subordinate within IRS are required to be in writing. The defendant United States failed to produce any "special order of the Secretary or his delegate" authorizing Mitchell to hold the sale outside of San Miguel County. The fact is that there is no such "special order".

2. *Mitchell did not have the authority to select the alternative method of sale of the property, that is, "under sealed bids".*

Section 6335(e)(2) provides:

> Additional rules applicable to sales. The Secretary or his delegate shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary or his delegate shall select the alternatives applicable to the sale. Such regulations shall provide:
>
> (a) That the sale shall not be conducted in any manner other than –
> (i) by public auction, or
> (ii) by public sale under sealed bids.

The Regulations thereunder, Section 301.6335-1(c)(5) provide:

> "Method of Sale – The district director shall sell the property either –
>
> (i) At public auction, at which open competitive bids shall be received, or
> (ii) At public sale under sealed bids."

So, by IRS regulation, the Secretary of the Treasury has delegated the statutory authority of Section 6335(e)(2) to the Denver District Director. However, Mitchell himself selected the alternative method of a "sealed bid" sale. IRS failed to produce any documents bearing on any such purported authority of Mitchell.

3. *Mitchell did not have the authority to issue Certificates of Sale under Section 6338.*

Mitchell himself issued and signed all of the Certificates of Sale, whereas Section 6338 of the Internal Revenue code

gives this authority by statute to the Secretary of Treasury or his delegate. Section 6338 provides:

> "Sec. 6338. CERTIFICATE OF SALE; DEED OF REAL PROPERTY.
>
> (a) Certificate of Sale – In the case of property sold as provided in section 6335, the Secretary or his delegate shall give to the purchaser a certificate of sale upon payment in full of the purchase price ***"

IRS failed to produce any documents showing Mitchell's authority to give a purchaser a certificate of sale.

Where the sale of real estate is involved, the contract must be in writing or it violates the Statute of Frauds, Colorado Revised Statutes, 1963, Sec. 59-1-8. It is noteworthy that neither the trial Court nor the Court of Appeals comments on the issue of the Statute of Frauds.

If the contract is to be subscribed by an agent as herein (Mitchell as purported agent for the Secretary of the Treasury or for the Secretary's delegate), the agent must be lawfully authorized in writing by the principal. C.R.S. 1963, Sec. 59-1-9. That statute provides:

> "Every instrument required to be subscribed by any party under Section 59-1-8 may be subscribed by the agent of such party, lawfully authorized by writing."

The purpose of the statute of frauds is to protect owners of property and others from fraud and perjury by other parties. See generally 37 CJS Frauds, Statute of, Sec. 1, et seq.

As Judge Hill stated in *Seagram & Sons v. Shaffer*, 310 F.2d 668 (10th Cir., 1962), cert den. 373 U.S. 948, 83 S. Ct. 1678, 10 L.Ed. 2d 704 (1963):

> "The object of the statute of frauds is to prevent fraud and perjury in the enforcement of obligations, depending for their evidencing support on the unassisted memory of the witnesses . . ."

Johnson v. Lennox, 55 Colo. 125, 133 P. 744 (1913), sets forth the law, at pages 129, 130:

> "It is the rule of law that the authority of any agent conferring power to execute an executory contract for the sale of real estate must be in writing, and that the agent must be given therein specific authority to do, either the general business of his principal, or the particular thing which he assumed to do. Also that the burden is put on [the party relying upon] a contract thus executed, to show that the person who signed the contract as agent, was authorized, not only to negotiate the sale, but also to conclude in writing a binding contract within the terms, conditions and limitations expressed in the contract sued on. Such an agent must strictly pursue his authority; and any person dealing with him is bound at his peril to learn the extent of that authority. Malone v. McCullough 150 Colo. 460, 24 Pac, 1040."

C.J.S. Vol. 2A, Agency §223, page 922, states this rule of law as follows:

> "An authorization to sell land must be clear and distinct . . . Under statutes so providing, the power to sell land exists only when expressly given . . ."

American Jurisprudence 2d, Volume 72, Statute of Frauds, §384 contains a discussion of the necessity for written authorization of an agent, where it is expressly required by statute (as under the Colorado statute of frauds).

In §386, American Jurisprudence says:

> "Not without reason or by mere inadvertence does a statute provide that the execution of a conveyance, if by an agent, must be by an agent authorized in writing, but that the execution of an agreement to convey may be made by any person lawfully authorized."

Further, American Jurisprudence says in §387:

"§387. Nature and sufficiency of authorization. According to some authority, the writing required by the statute to authorize an agent to bind his principal by a memorandum stipulating for the sale of real property is in the nature of a power of attorney the terms of which should be strictly construed. At any rate, the authority to sell must appear clearly in the writing (citing cases). Thus, it has been held that a contract for the sale of an oil and gas lease, entered into by an alleged agent of the owner of such lease and a third person, is invalid under the statute of frauds unless the authority of such agent to sell said lease is in writing, subscribed by such owner, and further that such writing must be specific and certain as to the authority conferred, the terms, description and parties, so that such authority is disclosed by the writing itself, and recourse to parol evidence to show the intention of the parties is unnecessary. (citing cases)."

The burden of proof, in establishing the validity of an alleged contract (involving questions of the violation of the statute of frauds) is upon the party (or parties) relying upon the alleged contract. *Johnson v. Lennox, supra; Malone v. McCullough, supra; Michelson v. Sherman,* 310 Mass. 744, 39 NE 2d 633, 139 ALR 960; *Patterson v. Beard,* 227 Iowa 401, 288 NW 414, 125 ALR 393; *Hargreaves v. Burton,* 59 Utah 575, 206 P 262 33 ALR 1481; *Sinclair v. Sullivan Chevrolet Co.,* 31 Ill. 2d 507, 202 NE 2d 56; 29 Am. Jr. 2d Evidence, Sec. 140.

In this proceeding, the United States (IRS) asserts the validity of the real estate conveyances (i.e. the Certificates of Sale). Yet, IRS has failed to produce any written authorization for Mitchell to subscribe the conveyances in accordance with the Statute of Frauds. None exists and, accordingly, the Certificates of Sale are null and void under the applicable Colorado statute. C.R.S. Sec. 59-1-9.

4. *The defendants, including the United States of America (IRS), did not produce any of the documents showing*

Mitchell's authority to perform any of the above three acts. The effect of this failure should be to determine these issues against the defendants.

Cases in point are *McAndrews v. Belknap,* 141 F.2d 111, 115 (6th Cir.) and *The Timken Roller Bearing Co. v. U.S.* (D. Ct. N.Dist. Ohio, 1964) ____ F. Supp. ____ 17 AFTR 2nd 322.

In the instant case, IRS should have either produced the documents which establish the matters in issue, to wit: (1) Mitchell's alleged authority to hold the sale outside of San Miguel County; (2) Mitchell's authority to select the sealed bid method of sale; and (3) Mitchell's written authorization to convey the government's interest in the real property; or, upon the failure of IRS to produce such evidence, the Court should have determined these matters against IRS and the other defendants.

Guaranty of due process of the Fifth Amendment

Silver Bell maintains that it has been deprived ot its property without due process of law.

American Jurisprudence 2d, Constitutional Law, §544, Nature of Guaranty, says:

"The guaranty of due process of law is one of the most important to be found in the Federal Constitution or any of the amendments; it has beeen described as the very essence of a scheme of ordered justice, and it has been said that without it the right of private property could not be said to exist, in the sense in which it is known to our laws."

American Jurisprudence 2d, Constitutional Law, §552, states:

"It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so

vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (Citing among other cases, *United States v. Spector*, 343 U.S. 169, 96 L.Ed. 863, 72 S.Ct. 591, *reh. den.* 343 U.S. 951, 96 L.Ed. 1353, 72 S.Ct. 1040.)

Further in §552, at pg. 952, it is stated:

"An executive order must, in order to satisfy the constitutional requirement of due process, show the existence of the particular circumstances and conditions under which the making of such an order has been authorized by Congress." (Citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241.)

Discussion of Section 6337

Section 6337 of the Internal Revenue Code attempts to set forth the manner in which a taxpayer, as Silver Bell, can redeem its real property under an IRS tax sale. The method and manner set forth in the statute is so unclear, indefinite and confusing that the statute itself is unconstitutional. Silver Bell attempted to submit the redemption monies to IRS. Mitchell refused to accept such monies and directed Silver Bell to forward the monies to Scandian and Donnelly. Obviously both IRS (Mitchell) and Silver Bell failed to interpret Sec. 6337. A reading of the statute leaves any reasonable person unclear and indefinite as to what action Silver Bell should have taken.

In its present form, Section 6337 is confusing and unclear to taxpayers and IRS agents alike. Accordingly, the statute should be voided and declared unconstitutional. It then follows that since Silver Bell lost its right to redeem because of an unconstitutionally vague statute that its property should be returned to it and Scandian and Donnelly made whole. In this connection it is noted that at the commencement of the legal proceedings in this matter, Silver Bell deposited with the registry of the United States District Court the monies due Scandian and Donnelly.

Discussion of Section 7502

When Silver Bell attempted to comply with the redemption provisions of Sec. 6337, it mailed the redemption monies from Denver, Colorado, to Scandian and Donnelly in Texas. This was at the express direction and instruction of IRS (Mitchell). Silver Bell maintains that such mailing, read in the light of Section 7502 of the Internal Revenue Code, satisfied the timeliness provisions of Sec. 6337.

The trial Court and Court of Appeals held that Sec. 7502 does not relate to Sec. 6337, and that the redemption monies must actually be in the hands of Scandian and Donnelly within the 120 day period. If such a statutory interpretation ensues, then Sec. 7502 is patently unclear and unconstitutional insofar as it affects a taxpayer's right of redemption under Sec. 6337.

Silver Bell urges that Section 7502, which covers mailings under the Internal Revenue laws, is controlling in the case at bar. Congress amended Section 7502 of the Internal Revenue Code by P.L. 89-713 (November 2, 1966) and P.L. 90-364 (June 28, 1968). As a result thereof, payments required under any of the Internal Revenue laws are treated as being made when mailed. Section 7502. (set forth in full in the Appendix).

The pertinent portion of Section 7502 reads:

". . . any payment required to be made, within a prescribed period or on or before a prescribed date *under authority of any provision of the internal revenue laws.*" (emphasis added)

A taxpayer's right of redemption of real property arises under authority of a provision of the internal revenue laws. Accordingly, it follows that a mailing, in accordance with Section 7502 of the internal revenue laws, satisfies the requirement for payment.

Section 7502 should be read and applied in conjunction with the redemption Section 6337. Otherwise, there is no

absolute way in which a taxpayer like Silver Bell (under the circumstances in the instant case) could have proceeded to absolutely accomplish a redemption of its properties. IRS (Mitchell) had refused to accept tender of the redemption monies and Mitchell had instructed Silver Bell to pay the monies for redemption to the purchasers of the certificates. Mitchell gave Silver Bell the names and addresses of the purchasers, including Scandian and Donnelly, both of whose mailing addresses were in the state of Texas.

If timely mailing cannot accomplish a redemption under the internal revenue laws, how then is a taxpayer to accomplish it?

Under our internal revenue laws, Congress has encouraged the use of the mails. Mailing constitutes filing of pleadings in the forum created by Congress to handle tax cases, the United States Tax Court. Mailing of our tax returns and mailing of all of the many other documents and elections under the tax laws have been authorized by Congress.

The very statute in question, Section 7502, is entitled "TIMELY MAILING TREATED AS TIMELY FILING AND PAYING".

If the Courts were to interpret any requirement of or right under the Internal Revenue Code as not being satisfied by a timely mailing, it would create chaos for the federal agency administering these statutes, i.e. IRS. There simply are not enough personnel available to handle the many matters involved in the administration of the tax laws, without recourse to and use of the United States mails. Congress intended this, and it gave us this statute – Section 7502 – for this purpose.

Perhaps the best way to place this or any other taxpayer's dilemma into perspective is to state the problem rhetorically, with respect to what action should be taken to effect a redemption. Is a taxpayer to get on a plane and fly to Texas, and seek to locate the buyer in person? What if no one is in an office address, such as Donnelly's, what then?

What if the mailing address is a post office box? What if, on May 10, 1972, Silver Bell had mailed the redemption monies to IRS, and not to Scandian and Donnelly? Would such a mailing have satisfied the requirements of Section 7502?

The answer is that such an unfair and inequitable result (as the trial Court reached) was not intended under the internal revenue statutes. Any fair and reasonable interpretation of the taxing statutes must come to the conclusion that Silver Bell's mailings, on May 10, 1972, met the intent and meaning of the requirements for redemption.

Otherwise Section 7502, when considered with Section 6337, is so vague and unclear as to be unconstitutional.

REASONS FOR GRANTING THE WRIT

1. Silver Bell has lost valuable real estate, worth in excess of $300,000.00 according to Scandian and Donnelly, in an IRS tax sale in which only $6,800.80 was received (1) because of the illegal and unauthorized actions of an IRS Revenue Agent under the provisions of Sections 6335 and 6338; and (2) because of the unclear and indefinite provisions of Sections 6337 and 7502 of the Internal Revenue Code. A Supreme Court review of the applicable taxing statutes can go a long way toward clarifying an area of the law in which the power exercised by IRS is awesome and yet its statutory authorization is somewhat unclear.

2. This case presents a shocking example of the collection procedures (lien, levy, seizure and sale) of IRS and its agents – a large and continuing area of violation of individual taxpayers' rights. This case affords the Court an outstanding opportunity (under the instant facts) to review the procedures of IRS in this sensitive area of citizens' abuse by a large federal agency. This case encompasses a judicial interpretation of the taxing statutes applicable to IRS powers re lien, levy, seizure and sale, and the taxpayer's right of redemption, as well as the requested judicial review of the administrative methods used by IRS under said statutes.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-4168

SILVER BELL INDUSTRIES, INC., Plaintiff,	)	
v.	)	**MEMORANDUM OPINION AND ORDER**
UNITED STATES OF AMERICA, SCANDIAN COMPANY, INC., and RICHARD DONNELLY, Defendants.	)	

APPEARANCES

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For the Defendant Richard Donnelly:	Donald K. Bain, Esq. 1700 Broadway, Suite 1010 Denver, Colorado 80202
For the Defendant Scandian Company, Inc.	James H. Mosley, Esq. 1230 Colorado State Bank Building Denver, Colorado 80202

FINESILVER, Judge

This action concerns conflicting claims in the rights, title, and interest of certain mining claims in San Miguel County of Colorado. The conflict between the parties arises out of and pursuant to the redemption procedures and requirements of the Internal Revenue Code of 1954. 26 U.S.C.A. §§6335, 6337, 6338.

The real conflict is between the plaintiff and the defendant purchasers, Richard Donnelly and Scandian Company, Inc.; defendant United States may be properly characterized as a "stakeholder".

In substance, the crucial issue to be decided is who is entitled to the mining claims in dispute. Either the plaintiff redeemed the property timely and within the statutory procedural requirements or it did not.

We hold that the attempted redemption by plaintiff was ineffective as it was (1) untimely (2) the amount tendered was insufficient and (3) the tender was conditional.

FACTS

I.

In November, 1971, defendant United States, through the District Director of Internal Revenue for the District of Colorado, levied and seized certain mining claims of plaintiff situated in San Miguel County, Colorado, for failure to pay delinquent employment taxes when due and commencing in the year of 1970. The levy was for unpaid employment taxes in the total amount of $52,936.54 for the calendar quarters ending June 1970, September 1970, March 1971 and June 1971.

Plaintiff was given notice of seizure and notice of sale of claim for failure to pay taxes was duly published. Defendants Donnelly and Scandian Company, Inc., purchased the property at a public auction on January 12, 1972, and received Certificates of Sale. (Pltf. Ex.24, Defts. Ex.AA). Proper procedures were followed at the sale and Donnelly purchased four of the properties sold; Scandian purchased one parcel.

The Certificates of Sale purchased by defendants Donnelly and Scandian were surrendered and timely demands made for Deeds. The Deeds, properly executed, have been delivered to the Clerk of the Court and await further order of this Court.

II.

Plaintiff had a history of irregular and late tax payments. While it made periodic payments on its tax liability, at no time prior to the sale date of January 12, 1972, had it paid sufficient amounts to discharge its tax liability for the taxes for which the levy and seizure of its property were made.

Plaintiff made no effort to redeem the properties during the period from January 12, 1972, until May 10, 1972.

III.

Pursuant to the clear requirements of Section 6337(b)(1) of the Internal Revenue Code, the owners of any real property sold pursuant to Code Section 6335 "... shall be permitted to redeem the property sold, or any particular tract of such property, within 120 days after the sale thereof."

Section 6337(b)(2) provides for redemption "... upon payment to the purchaser, or in case he cannot be found in the County in which the property to be redeemed is situated then to the Secretary or his delegate, for the use of the purchaser ... the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum."

On May 10, 1972, plaintiff, acting through its executive, Mr. Sanders, mailed a check for $5,624.43 to defendant Donnelly in Midland, Texas (Pltf. Ex.42), and a check for $1,590.98 to defendant Scandian in Seabrook, Texas (Pltf. Ex.'s 30 and 31). The checks were sent by certified mail, return receipt requested. The checks were received by defendants on May 12, 1972, but were not accepted by them, and were ultimately returned by Donnelly and Scandian.

It is significant that the checks were received by defendants as purchasers of the tax certificate on May 12, 1972,

the *121st* day. We conclude that the tender was not timely. *Ballard v. United States*, 67-2 USTC Sec. 9652 (D.Colo. 1967) (opinion by Chief Judge Arraj). We also note that the checks of plaintiff were not certified or bank drafts but were personal checks of the company. The transmittal letters state:

> "After sufficient time has elapsed for clearance of our checks at the bank, will you please return your certificate(s) of sale with a notation that you have received payment in full." (Pltf. Ex.'s 30-31)

Also, from our interpretation of the transmittal letters, redemption was not to be effective until checks had cleared the First National Bank of Denver – drawee bank.

We do not agree with plaintiff's interpretation of Section 7502 of the Internal Revenue Service Code that mailing within redemption period constitutes redemption. This section is applicable to payments for required tax returns or tax payments, and not redemption of tax certificates.

IV.

We find that the checks tendered to the purchasers were not in amounts sufficient to comply with the statutory requirements for redemption. We find that plaintiff tendered an insufficient amount for redemption of certificates; *i.e.* $32.98 less than required by Section 6337(b)(2).

In our view a tender of amount due under the redemption statute must be in the full required amount, in cash or certified checks, or cash equivalent, and timely made.

V.

We have considered plaintiff's contention that it tendered the adequate redemption amount to the Internal Revenue Service. The evidence does not support this contention of attempted tender; also, we construe the 6337(b)(1) as to payment to the Internal Revenue to be applicable only where the owner cannot locate the purchaser. This is not the case here.

VI.

We reject plaintiff's contentions that (a) an amount was timely paid by plaintiff in excess of its tax liabilities to Internal Revenue Service, (b) within the redemption period, and (c) that the Internal Revenue Service was required to use this surplus to redeem the property. Applicable statutory provisions provide that excess tax payments shall be credited to tax owed under any tax statute and that any additional balance shall be refunded, 28 U.S.C.A. Sec. 3503.

The evidence does not support plaintiff's contentions that its payment of $44,232.41 on March 23, 1973, was adequate to redeem the property sold for taxes.

The Internal Revenue Service has no authority or responsibility to apply payment toward redemption of property earlier sold at tax sales. The rights of the purchaser of the tax certificates – defendants Scandian and Donnelly – had intervened while plaintiff attempted to resolve its tax difficulties with the Internal Revenue Service. These rights under applicable statutes could not be affected by any alleged overpayment of tax liability by plaintiff in regard to its over-all tax liabilities with the Internal Revenue Service. We expressly find that no excess funds were paid to the Internal Revenue Service to apply on any purported redemption.

VII.

We recognize the presumption that public officers are presumed to follow the law and fully discharge their duty until the contrary is shown. It is also presumed that the deeds were properly issued and that there was full compliance with tax laws in their issuance.

Plaintiff has not established its entitlement to the deeds of any impropriety in levy, seizure and sale of property for unpaid employment taxes.

The Internal Revenue Service officials complied strictly and literally with the language and spirit of applicable tax

laws relating to levy, seizure and sale of property, and issuance of tax certificates for unpaid employment taxes. The deeds in the Registry of the Court are *prima facie* proof of the regularity of the proceedings recited therein as provided in Section 6339(b) of the Code. The presumption of regularity and compliance with the law has not been overcome by the plaintiff.

CONCLUSIONS OF LAW

We conclude as follows:

There was full compliance with applicable law by the Internal Revenue Service in the computation of unpaid employment taxes, and levy, seizure, and sale of plaintiff's property for failure to pay taxes.

Plaintiff did not satisfy the redemption requirements of the Internal Revenue Service Code Sections 6337(b)(1) and (b)(2) dealing with redemption of real estate after the sale for unpaid federal taxes.

The attempted tender of redemption monies by plaintiff was not made timely and pursuant to statutory procedural requirements; further, the amounts tendered were insufficient and tenders conditional.

Defendants, Scandian and Donnelly, are entitled to delivery of the tax Deeds.

JUDGMENT TO ENTER

We find the issues joined in favor of defendants and all of them and against the plaintiff. Judgment in favor of defendants and against plaintiff shall be entered by the Clerk of the Court and the amended complaint dismissed. Costs to be borne by each party.

This order constitutes the Findings of Fact and Conclusions of Law as required under Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff's Amended Complaint be, and it hereby is dismissed and judgment enter in favor of defendants and against plaintiff. The Clerk of this Court shall deliver to defendant, Donnelly and Scandian respectively, the deeds in which they are named as grantees which are in the registry of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff and its agents, attorneys, employees and all persons acting by, through or under plaintiff be, and they hereby are, enjoined and restrained from asserting or claiming any right, title or interest in the following described lands in San Miguel County, Colorado, to-wit:

One Lot consisting of the following Mining Claims:

Gold Butte, Gold Butte Extension, Gold Cliff, Gold Cliff Extension, Gold Coin, Gold Coin Extension, Gold Corner Gold Corridor, Gold Corridor Extension, Gold Crescent, Gold Crescent Extension, Gold Lilly, Gold Lilly Extension, Gold Rose, and Gold Rose Extension Lodes, 7777, ISMD	150.417 acres
That part Ophir Townsite described as follows: Beginning at Corner No. 2 SD Townsite, thence North 84°10' West 500 feet, thence North 5°55' East 435.6 feet, thence South 84°10' East 500 feet, thence South 5°55' West 435.6 feet to point of beginning, Also known as Illium Millsite	5 acres

One Lot consisting of the following Mining Claims:

Loopton Lode, 14048, ISMD	8.104 acres
Muggins Lode, 8603A, ISMD	10.330 acres
Muggins Millsite, 8603B, ISMD	2.850 acres
Bryan, Fairplay, Grant and Waterloo Lodes, 15552, ISMD	37.931 acres
El Bunster Lode, 752, ISMD	7.15 acres
Honduras Lode, 640, ISMD	10.33 acres
Nellie J. Lode, 751, ISMD	10.33 acres

One Lot consisting of the following Mining Claims:

Bryan, Mobile, Monarch, Narcross Lodes, 15575, ISMD	21.000 acres
Butler Lode, 422, ISMD	10.330 acres
Caporal Lode, 13556, ISMD	9.795 acres
C. B. Kountze, and Denver Glove Lodes, 18040, ISMD	11.825 acres
G.W.G. and Sierra Lodes, 12735, ISMD	19.779 acres
Lookout, Pittsburg and Silver Cup Lodes, 13555, ISMD	25.600 acres
Silver Bell Lode, 13622, ISMD	4.590 acres

One Lot consisting of the following Mining Claims:

Balm of Gilead and Buckeye No. 2 Lodes, 12416, ISMD	20.58 acres
Buckeye and Butterfly Lodes, 6019, ISMD	19.33 acres
Dave Day, Little Johnny, Little Tony, Medore, Mizpah, Pathfinder, Robert N. Steele, Robert Peary, and Schley Lodes, 20027, TL and ISMD	98.762 acres

Duffy Lode, 13264, ISMD	6.227 acres
Ida, Ida No. 1 and Ida No. 2 Lodes, 12342, ISMD	20.705 acres
Sundown Lode, 12235, ISMD	10.170 acres
Terrible Lode, 1435, ISMD	8.940 acres

One Lot consisting of the following Mining Claims:

American Eagle, Bimetallic, and Victor Lodes, 9597	26.98 acres
Badger and London Lodes, 9251, ISMD	16.49 acres
Belcher Lode, 634, ISMD	7.04 acres
Golden Crown Lode, 540, ISMD	10.26 acres
Humming Bird Lode, 540, ISMD	4.996 acres
Osceola Lode, 541, ISMD	10.33 acres
Texas Lode, 1821, ISMD	7.43 acres
Und. 7/12 Atlas Lode, 1033 ISMD	10.330 acres
Globe Lode, 1034, ISMD	3.690 acres
Suffolk Lode, 1032, ISMD	7.310 acres
Summit Lode, 724, USMMD	9.490 acres

Dated 12 July, 1974.

BY THE COURT:

SHERMAN G. FINESILVER

United States District Judge

APPENDIX B

(NOT FOR ROUTINE PUBLICATION)
(see Rule 17, 10th Cir.)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1641

SILVER BELL INDUSTRIES, INC., Plaintiff-Appellant, v UNITED STATES OF AMERICA, SCANDIAN COMPANY, INC., and RICHARD DONNELLY, Defendants-Appellees.	)))))))	Appeal from the United States District Court for the District of Colorado (D.C. No. C-4168)

Gene F. Reardon, Denver, Colorado (Reardon, Reardon and Reardon, Denver, Colorado, on the brief) for Plaintiff-Appellant

Donald K. Bain, Denver, Colorado (John R. Webb and Holme, Roberts & Owen, Denver, Colorado, on the brief for Defendant-Appellee Richard Donnelly; and Mosley, Wells & Dean, Denver, Colorado, on the brief for Defendant-Appellee, Scandian Company, Inc.) for Defendants-Appellees

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Before SETH, HOLLOWAY and McWILLIAMS, Circuit Judges

HOLLOWAY, Circuit Judge

This appeal is from a judgment denying relief in a suit by the owner of mining claims to set aside tax sales of its properties and certificates of such sales issued to appellees Donnelly and the Scandian Company.[1] The sales were made by the IRS to satisfy delinquent federal employment taxes due from appellant Silver Bell Industries, Inc.

Silver Bell essentially argues that the revenue officer who conducted the sales lacked authority to make various determinations concerning the sales procedures; that the officer had no authority to hold the sale in Denver, instead of in San Miguel County where the properties were situated; that he lacked other written authority; and that, therefore, the sales certificates were void. Silver Bell also contends it had paid all amounts due for the second quarter of 1971 prior to the filing of any lien therefor, making the seizure and sale invalid. It argues that the revenue officer, Mitchell, improperly credited payments by Silver Bell, with the net result that Silver Bell had paid amounts in excess of its liabilities and amounts needed for timely redemption of the properties sold.

Silver Bell contends it satisfied the requirements for redemption by tender of proper amounts to the IRS and by timely mailing of checks to Donnelly and Scandian Company, Inc., the purchasers at the tax sales.

The trial court rejected all the challenges to the validity of the sales and the redemption arguments, and denied relief.

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[1] The United States was named a defendant by the amended complaint, which sought to enjoin issuance of the tax deeds. A motion for summary judgment was made by the Government, but not ruled on prior to entry of the pretrial order. By agreement the deeds were prepared and deposited in the registry of the court, pending disposition of the case. The pretrial order stated that it was agreed that the United States was no longer required to be an active participant in the case. The final judgment was in favor of all defendants.

34 AFTR 2d 74-5682. The court's findings and conclusions were essentially as follows:

The levy predicating the sale of Silver Bell's properties was for unpaid employment taxes amounting to $52,936.54 for calendar quarters ending June 1970, September 1970, March 1971, and June 1971. Silver Bell was given notice of seizure and sale and Donnelly and Scandian purchased the property at public auction[2] on January 12, 1972, and received certificates of sale, subsequently surrendered for deeds to the properties.

It was found that Silver Bell made no effort to redeem the properties until May 10, 1972; that Silver Bell then mailed checks for $5,624.43 and $1,590.98 respectively to Donnelly and Scandian, which were received on May 12, the 121st day after the sale. The court found the tender was not effective on mailing, and that it was not made within the 120 days allowed for redemption, and was untimely; that the amounts were insufficient; and that the tenders were conditional.

It was also found that the proof did not support Silver Bell's contention that it tendered an adequate amount toward redemption to the IRS; that the law required that excess tax payments by Silver Bell be credited to tax owed, and that any additional balance be refunded. The court found that the IRS complied strictly with the laws on levy, seizure and sale; that the deeds were prima facie proof of the regularity of the proceedings; and that the presumption of regularity and compliance with the law had not been overcome.

We agree with the trial court. We feel that its findings are amply supported by the record and the presumptions which apply, and that the conclusions drawn were correct.

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[2]The property was actually sold at public sale under sealed bids. See 26 USCA §6335(e)(2)(A). Silver Bell complains of the lack of authority of the revenue officer, Mitchell, to select that alternative method of sale, but we agree with the trial court that this contention lacks merit.

Our discussion will be confined to Silver Bell's main appellate arguments and the facts pertinent to them.

First, Silver Bell challenges the regularity of the sale in several respects. It contends initially there was no "special order" by the Secretary of the Treasury or his delegate as required by 26 USCA §6335(d). Such a defect would make the sale invalid. Johnson v. Gartlan, 334 F.Supp. 438, 440-41 (E.D. Va.), rev'd on other grounds, 470 F.2d 1104 (4th Cir.). The statute provides in part:

> The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate.

The criteria for such a special order are stated in 26 CFR §301.6335-1(c)(1).[3] The order is to be issued only if it appears to the Director that substantially higher bids may be obtained for the property if the sale is outside the county. The specific provisions for such a special order in §6335(d) are not insignificant technicalities and must be strictly followed. It has long been the rule that "... the person invested with such a power [of sale] must pursue with precision the course prescribed by law, or his act is invalid ..." Thatcher v. Powell, 19 U.S. 54, 56. Moreover, the burden of showing literal compliance with statutes governing the sale of land for taxes rests on the claimant under the tax sale. McAndrews v. Belknap, 141 F.2d 111, 115 (6th Cir.).

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[3]The regulation, which was in effect at all material times, provides in part:

> The place of sale shall be within the county in which the property is seized, except that if it appears to the district director under whose supervision the seizure was made that substantially higher bids may be obtained for the property if the sale is held at a place outside such county, he may order that the sale be held in such other place. The sale shall be held at the time and place stated in the notice of sale.

Silver Bell argues that the record shows that there was no such "special order," relying on the deposition of the revenue officer, Mr. Mitchell. He was asked whether there was such a "special order" and replied that there was a "general authorization from the District Director authorizing the sales outside the county," but that he was not aware of any special order with respect to this particular sale.[4] Silver Bell's attorney asked the Assistant United States Attorney if the document could be made available, and said to her: "Well, we are looking for a special order of the Secretary." (Supp. Vol. III, 97).

There is no indication in our record of any production of such a document. By the time of trial Mitchell had retired. When questioned at trial as to why he did not then have the documents, he explained that he had retired.

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[4]The deposition testimony was as follows:

Q Now, was there a special order of the Secretary of the Treasury or his delegate authorizing this sale to be held outside of San Miguel County?

A There is a general authorization from the District Director authorizing the sales outside the county.

Q Now, where is that document?

A. In the District Director's office.

Q Now, did you bring that document with you today pursuant to the notice of deposition?

A No, sir.

MR. REARDON: Again, Carolyn, could you make that document available to us?

MRS. MC NEILL: [Assistant United States Attorney] Are you talking about a general delegation of authority?

MR. REARDON: Well, we are looking for a special order of the Secretary.

Q Let me ask you this, Mr. Mitchell: Was there any special order with respect to this particular sale that you were aware of?

A No, sir. (Supp. Vol. III, 96-97).

The deposition was received in evidence (Supp. Vol. I, 176).

It is true that no "special order" was produced and that Mitchell's testimony raised a serious question. He had handled the account of Silver Bell and the procedures before the sale and conducted the sale. And he said he had the files in his possession at the deposition (Supp. Vol. III, 15-18), and that he was aware of no "special order" concerning this sale. However, in meeting their burden the claimants under the sale, Donnelly and Scandian, produced the deeds and they recite that the lands were "sold as provided by Section 6335 . . . and the regulations promulgated thereunder,. . . ." The recital is prima facie evidence of the facts stated. 26 USCA §6339(b)(1).[5] And in conjunction with a tax sale it has been held that ". . . the law presumes that persons acting in a public office have been duly appointed, and are acting with authority, until the contrary is shown." Keely v. Sanders, 99 U.S. 441, 447.

The question is not free from doubt, because of Mitchell's deposition testimony and the files there examined. Nevertheless, he referred to a "general authorization from the District Director authorizing the sales outside the county." It was within means available to Silver Bell by the time of trial to develop whether a sufficient order existed, based on proper determinations, complying with the statute and regulations. In view of the state of the record, we cannot say the trial court erred in finding that "[t]he deeds in the Registry of the Court are prima facie proof of the regularity of the proceedings recited therein as provided in Section 6339(b) of the Code. The presumption of regularity and compliance with the law has not been overcome by the plaintiff."

Other related arguments are made by Silver Bell that the revenue officer, Mitchell, was not shown to be authorized to select an alternative method of sale under sealed bids (see 26 USCA §6335(e)(2)), or to issue the certificates of sale (see

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[5]Section 6339(b)(1) provides:

> (1) Deed as evidence. – the deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated;

26 USCA §6338(a)). Silver Bell again points to failure of the revenue agent to produce the documents showing such authority and to the failure of the IRS to produce such documents despite requests for them, and says that the questions should be resolved against the parties relying on the validity of the procedures (Brief for Appellant, 15-17). We disagree. The means for pursuing the matter, and for establishing at trial whether there was a lack of delegation of authority, were available to Silver Bell. We are referred to no showing of such efforts. We agree again with the trial court's holding that the proceedings should be presumed to have been regular. See Keely v. Sanders, 99 U.S. 441, 447.

Second, Silver Bell contends that it had fully paid all amounts due for its federal employment taxes for the second quarter of 1971 prior to the filing by Mitchell of any lien therefor, and that the seizure and sale for said period were invalid (Brief for Appellant, 17-19).

Silver Bell points to the IRS tax statement for the period ended June 30, 1971, showing that it owed $14,975.44 (Ex. 13), to its payments of $9,000 and $5,957.44 on October 1 and 8, 1971 (Ex. 9), and to its attorney's letter of October 4, 1971, stating "we assume you will apply [the $9,000] to the account in the approximate amount of $14,000" and that with another payment of approximately $5,000 "[t]his would clear up the aforesaid quarter in the approximate amount of $14,000." (Ex. 15). Silver Bell argues that the voluntary payments should have been credited as the debtor directed, citing Revenue Ruling 58-239, 1958-1 Cum. Bull. 94, inter alia; and this being prior to filing of a lien therefor, the seizure and sale were invalid.

The $14,975.44 paid in October, 1971, apparently was credited to the third quarter liability in 1971 (Supp. Vol. I, 169-70), instead of the second quarter. Furthermore, a payment of $14,233.61 was made on December 7, 1971, in payment of the exact amount of the third quarter tax (see Ex. 9; Supp. Vol. 1, 170). Nevertheless, the seizure and sale under 26 USCA §6333 were authorized if Silver Bell was liable for any tax that it had neglected or refused to pay

within 10 days after notice and demand. 26 USCA §6331(a). The levy under which the sales were made was for $52,936.54, covering federal employment taxes for four quarters ended June 30 and September 30, 1970, and March 31 and June 30, 1971, and statutory additions. As the figures on the levy show,[6] applying the $14,957.44 payments made in October, 1971 as Silver Bell wished would have left some $35,227.65[7] as the unpaid balance of assessments at the time of the levy on November 15. By the time of the sale on January 12, 1972, payments still had not been made which would have satisfied the levy in full, and a substantial amount covered by the levy – over $20,000 – would have remained

[6]The levy was made November 21, 1971, and is Ex. 21. In part it states that federal employment taxes, assessed and unpaid, for the four quarters were as follows:

Tax Period Ended	Date of Assessment	Unpaid Balance of Assessment	Statutory Additions	Total
9-30-70	4-2-71	$16,948.11	$1,176.54	$18,124.65
3-31-71	6-18-71	14,678.97	723.28	15,402.25
6-30-70	4-2-71	3,600.57	562.62	4,163.19
6-30-71	9-17-71	14,957.44	277.01	15,234.45
	Lien fees		12.00	12.00
			Total Amount Due:	$52,936.54

The levy further states that the unpaid amount was "for internal revenue taxes for which notice and demand has been made for payment. Section 6331, Internal Revenue Code, authorizes collection of taxes by levy . . ."

[7]From the middle column above, the total of unpaid assessments, exclusive of the $14,957.44 payments, and the statutory additions, is $35,227.65.

due in any event, according to our record.[8] Hence we agree with the finding of the trial court that "at no time prior to the sale date of January 12, 1972, had [Silver Bell] paid sufficient amounts to discharge its tax liability for the taxes for which the levy and seizure of its property were made."

Third, Silver Bell argues that it properly redeemed its properties by payment to the IRS. Specifically it says that Mitchell improperly credited payments with the net result that Silver Bell paid the IRS monies in excess of its tax liabilities and amounts needed to timely redeem. And it argues that the provisions of the redemption statute, 26 USCA §6337, were satisfied by tender of the amounts for its taxes and redemption by its March 23, 1972, payment of $44,232.41; and that its president, Sanders believed this payment was sufficient to pay all delinquent taxes and to achieve redemption; that Mitchell refused to let Silver Bell attempt to reconcile its tax accounts; and that Mitchell knew that Silver Bell had, in fact, overpaid (Brief for Appellant, 22-23). Silver Bell argues it made an effective tender, citing Guthrie v. Curnutt, 417 F.2d 764 (10th Cir.).

The trial court found that "[t]he evidence does not support plaintiff's contentions that its payment of $44,232.41 on March 23, 1972, was adequate to redeem the property sold for taxes." In connection with the issue we have considered the testimony and exhibits, particularly Ex. 1, the IRS transcript of the account of Silver Bell, and Ex. 34, the March 23, 1972, letter transmitting the $44,232.41 payment to Mr. Mitchell. We have also considered the analysis of the figures in the appendix to the brief of Appellees.

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[8]There was a further payment of $14,233.61 on December 7, 1971. This was apparently the exact amount of the third quarter tax. This amount was credited to the fourth quarter (Supp. Vol. I, 170). Silver Bell says this was a misapplication to a quarter for which the return and tax were not then due. However, even if the $14,233.61 is treated as applying to the earliest liability under the rule Silver Bell relies on, this still would not have satisfied, before the sale, the $35,227.65 of unpaid assessed balances shown on Exhibit 21, (See Supp. Vol. I, 173).

From the record and consideration of the contentions we are satisfied that the record sustains the finding that the evidence does not support plaintiff's contentions that Silver Bell's payment of $44,234.41 on March 23, 1972 was adequate to redeem the property sold for taxes. The tax liabilities and credits as a whole show no credit to Silver Bell exceeding approximately $3,800 to apply toward redemption. Redemption of all of Silver Bell's properties would have required over $10,976.80 – the price paid for all of them, including some not involved in this case.[9] The appellees paid $6,800.80 for the properties involved herein (Brief for Appellant, 2), and the amount required by §6337(b) for redemption from appellees would thus have been over $6,800, when the interest is added. Thus even treating such $3,800 credit as applicable to redemption, the amount was still insufficient, as the trial court found.[10]

Silver Bell argues that Sanders made a tender to Mitchell of the redemption money which was sufficient. It is true that Guthrie v. Curnutt, 417 F.2d 764, 765-66 (10th Cir.) holds that "when a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced." The trial court found, however, that "the evidence does not support this contention of attempted tender." There

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[9]The tax sale of January 12, 1972, involved the sale of eight separate Silver Bell properties. Four of these were purchased by Donnelly for the respective amounts of $1,554.17, $870.30, $1,029.19 and $1,847.14 (Exhibit 24). One was purchased by Scandian Co. for $1,500 (Ex. 36). The total sale price of the other three parcels was $4,176 (Ex. 36). These other properties are not the subject of this lawsuit.

[10]While it could be argued that the $3,800 credit was sufficient to redeem at least some of the five separate parcels of property, we find no duty on the IRS to guess which properties the taxpayer would wish to be redeemed. Furthermore, we agree with the trial court that the IRS was under no duty to apply excess tax payments towards redemption, instead of refunding the balance. See 26 USCA §3503.

is support for the finding in Mitchell's testimony (Supp. Vol. III, 65-68). The trial court heard the testimony and we cannot say the finding was clearly erroneous.

Fourth, Silver Bell contends that on May 10, 1972, it made a timely mailing of checks to appellees and thus satisfied the redemption requirement of 26 USCA §6337(b) for payment to the purchasers within 120 days after the sale.[11]

One argument is that the sale did not occur until January 21, 1972, making the May 10 mailing timely, because the offers to purchase were not accepted until January 21 by the Special Procedures Section of the IRS. The trial court found, however, that the sale occurred on January 12 and the finding is supported (Pl. Ex. 24; Def. Donnelly's Ex. E). The argument based on Mitchell's worksheet and later internal approval of the sale is not persuasive. The sale date within the meaning of §6337(b)(1) is that of the publicly conducted sale itself, of which notice is given. The interpretation suggested by Silver Bell would not be consistent with a common sense view of the event and its realities.

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[11] 26 USCA §6337(b) provides:

(b) Redemption of real estate after sale. –

(1) Period. – The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

(2) Price. – Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

Silver Bell also argues that if the sale date was January 12, 1972, then May 11, 1972, is the 120th day after the sale and that mailing the redemption checks on May 10, 1972, fulfilled the requirements of §6337(b), citing 26 USCA §7502(a)(1).[12]

Section 7502 is applicable to payments required to be made to an "agency, officer, or office." Here, the May 10 payment was being attempted to individual purchasers at the tax sale. The redemption payments attempted to such purchasers were not mailed to an "agency, officer, or office" of the Government, which we feel is the intent of §7502(a)(1).

The general rule is stated in 70 C.J.S. Payment §7, p. 218: "Payment is not effectuated by sending the amount due to the creditor by mail or other public carrier until the remittance gets into the hands of the creditor, unless he expressly, or by implication directs or consents to the usual course of dealings between the parties, from which the creditor's assent can be inferred." See 39 C.F.R. §153.5(a) (1974) (Recall of mail); Fitzgerald v. W. F. Sebel, Co., 295 F.2d 654 (10th Cir.). The trial court found that Silver Bell's checks to purchasers Donnelly and the Scandian Company (Ex. 42) were delivered on May 12, 1972, the 121st day after

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[12] §7502(a)(1) provides:

Date of delivery – If any return, claim, statement or other document required to be filed, or any payment required to be made within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the *agency, officer, or office with which such return, claim statement, or other document is required to be filed, or to which such payment is required to be made,* the date of the United States postmark, stamped on the cover in which such return, claim, statement or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be (emphasis added).

the sale. Silver Bell does not challenge the fact that this was the date of delivery, and in light of the mailing rule we agree with the trial court's finding that the tender was untimely.

Silver Bell also admits that the amounts of money tendered to the purchasers for redemption were not the full amounts required (Brief for Appellant, 3, 31). It argues however, that the *de minimis* rule applies, saying that in one instance the amount tendered was only $7.21 less than $1,598.19 required for redemption and in the other instance $23.36 less than $5,647.79 required (Pl. Ex. 42).[13] We disagree. The redemption attempted was not in "the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum." 26 USCA §6337(b)(2). The general rule is that "... all that is due must be tendered." Cameron County Water Improvement District No. 8 v. De La Vergne Engine Co., 100 F.2d 523, 524; see 5 A.L.R. 1226. We are not persuaded that this case comes within the maxim "de minimis non curat lex." See 5 A.L.R. 1234. We agree with the trial court's finding that the tenders were insufficient.

In sum, we are satisfied that the trial court's findings are supported by the record and that its conclusions were not in error.

AFFIRMED.

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[13]The trial court found the total shortage was $32.98, which is the amount appellees rely on (Brief for Defendants-Appellees, 27). The difference is not significant for our purposes since we feel the *de minimis* rule does not apply.

APPENDIX C

INTERNAL REVENUE CODE OF 1954

SEC. 6335. SALE OF SEIZED PROPERTY.

(a) Notice of Seizure. – As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of Sale. – The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

Last Amendment. – Sec. 6335(b) appears above as amended by Sec. 104(d) of Public Law 89-719, Nov. 2, 1966 (qualified effective date rules in Sec. 114 of Public Law 89-719, Nov. 2, 1966). Sec. 6335(b) as it read before this amendment is in P-H Cumulative Changes.

(c) **Sale of Indivisible Property.** – If any property liable to levy is not divisible, so as to enable the Secretary or his delegate by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) **Time and Place of Sale.** – The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary or his delegate.

(e) **Manner and Conditions of Sale.** –

(1) **Minimum price.** – Before the sale the Secretary or his delegate shall determine a minimum price for which the property shall be sold, and if no person offers for such property at the sale the amount of the minimum price, the property shall be declared to be purchased at such price for the United States; otherwise the property shall be declared to be sold to the highest bidder. In determining the minimum price, the Secretary or his delegate shall take into account the expense of making the levy and sale.

(2) **Additional rules applicable to sale.** – The Secretary or his delegate shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary or his delegate shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than–

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary or his delegate may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary or his delegate to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary or his delegate may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) **Payment of amount bid.** – If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary or his delegate shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary or his delegate, the sale may be declared by the Secretary or his delegate to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(f) Stay of Sale of Seized Property Pending Tax Court Decision.–

For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

SEC. 6337. REDEMPTION OF PROPERTY.

(a) Before Sale. – Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary or his delegate at any time prior to the sale thereof, and upon such payment the Secretary or his delegate shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of Real Estate After Sale.–

(1) Period. – The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

Last amendment. – Sec. 6337(b)(1) appears above as amended by Sec. 104(e) of Public Law 89-719, Nov. 2, 1966 (qualified effective date rule in Sec. 114 of Public Law 89-719, Nov. 2, 1966). Sec. 6337(b)(1) as it read before this amendment is in P-H Cumulative Changes.

(2) Price. – Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record. – When any lands sold are redeemed as provided in this section, the Secretary or his delegate shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

SEC. 6338. CERTIFICATE OF SALE; DEED OF REAL PROPERTY.

(a) Certificate of Sale. – In the case of property sold as provided in section 6335, the Secretary or his delegate shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to Real Property. – In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary or his delegate shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) Real Property Purchased by United States. – If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary or his delegate shall at the proper time execute a deed therefor and without delay cause such deed to be duly recorded in the proper registry of deeds.

Last amendment. – Sec. 6338(c) appears above as amended by Sec. 104(f) of Public Law 89-719, Nov. 2, 1966 (qualified effective date rule in Sec. 114 of Public Law 89-719, Nov. 2, 1966).

Prior amendment. – Sec. 6338(c) was previously amended by Sec. 78 of Public Law 85-866, Sept. 2, 1958 (qualified effective date rule in Sec. 1(c)(2) of Public Law 85-866, Sept. 2, 1958). Sec. 6338(c) as so amended is in P-H Cumulative Changes.

SEC. 7502. TIMELY MAILING TREATED AS TIMELY FILING AND PAYING.

(a) General Rule –

(1) Date of Delivery – If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws, is, after such period or such date, delivered by United States mail, to the agency, officer or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery, or the date of payment, as the case may be.

(2) Mailing Requirements – This subsection shall apply only if

(A) The postmark date falls within the prescribed period or on or before the prescribed date –

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, property addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) Postmarks – This section shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations prescribed by the Secretary or his delegate.

(c) Registered and Certified Mailing –

(1) Registered Mail – For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail –

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified Mail – The Secretary or his delegate is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

(d) Exceptions – This section shall not apply with respect to–

(1) the filing of a document, in, or the making of a payment to, any court other than the Tax Court,

(2) currency or other medium of payment unless actually received and accounted for, or

(3) returns, claims, statements, or other documents, or payments, which are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing.